IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.807 OF 2007

Karmaveer Kakasaheb Wagh Education Society,
A society registered under the Societies Registration Act, 1860 vide No.MAH/202 Nashik and also registered as a Public Charitable Trust under provisions of the Bombay Public Trust Act, 1950 vide P.T.R. No.F-135, Nashik, and having its Registered Office situated at Heerabhai Haridas Vidyanagari, Amrutdham, Panchavati, Nashik 422 003.

Through its Trustees

1. Shri Balasaheb Deoram Wagh,
   Age: 70 years,
   Occ: Social Service & Agriculture,
   R/o. Pimpri, Tal: Niphad, Dist. Nashik.

2. Shri Madhavrao Trambakrao Jadhav
   Age: 73 years,
   Occ: Social Service & Agriculture,
   R/o. Kasbe Sukene, Tal: Niphad,
   District Nashik.

3. Shri Kashinath Bhau Tarle,
   Age: 69 years,
   Occ: Social Service & Agriculture,
   R/o. Chandori, Tal: Niphad,
   District Nashik.

4. Shri Pundlikrao Trambakrao Pangavane,
   Age: 77 years,
   Occ: Social Service & Agriculture,
   R/o Ugaon, Tal: Niphad,
   District Nashik.

5. Shri Changdeorao Bhagwat Holkar
   Age: 71 years,
   Occ: Social Service & Agriculture,
   R/o. Lasalgaon, Tal: Niphad,
   District Nashik ..Appellants.
   (Orig. Plaintiffs).

v.

Heerabai Hansraj Surjee Trust

A Public Charitable Trust registered
under Provisions of Bombay Public
Trust Act 1950 vide PTR No.1583 (BOM),
Having its registered office situated
at 113 Bazar Gate Street, Mumbai.

Through its Trustees

1. Shri Pravinbhai Dwarkadas Dalal
   Age: Major, Occ: Business,
   R/o. 42 Gold Mist, J.V.P.D.Scheme,
   Gulmohar Road, Juhu,
   Mumbai 400 049

2. Shri Chandrakant J. Mathuria,
   Age: Major, Occ: Business,
   R/o. 101 Dhaneshwar Tower,
   Govind Nagar, Sodawalla Lane,
   Borivli West, Mumbai 400 092.

3. Shri Narayandas Hirjeebhai Aasher
   Age: Major, Occ: Advocate,
   R/o. A/6 Gajanan Society,
   Panchavati, Kajanja,
   Nashik 422 003.

4. Shri Ashok Ratansi Merchant,
   Age: Major, Occ: Service,
   R/o.120-E, Dattani Nagar,
   S.V.Road,
   Borivli (West),
   Mumbai 400 092.

5. Shri Pundlikrao Jagannath Mogal,
   Age: Major,
   Occ: Social Service & Agriculture,
   R/o. Flat No.3, Shri Shubham
   Hsg. Society, Opp: Golf CLub,
   Rest House, Tidke Colony,
   Nashik- 422 002.

6. Shri Krishnaraj Gopaldas Khimji
   Age: 51 years,
   Occ: Business & Agriculture,
   R/o. 67, Girdhar Kunj, Devdas Road,
   Near Langer Petrol Pump, Ujjain,
   Madhya Pradesh.

7. Charity Commissioner of State of
   Maharashtra,
   Dharmaday Aayukta Bhavan,
   Dr.Annie Besant Road, Worli,
   Mumbai 400 028. ..Respondents.

Mr.P.B.Shah, adv. for the Appellants.

Mr.R.D.Soni i/b M/s.Ram & Co., advs. for the Respondents.

Mr.V.A.Thorat Sr.Counsel i/b M.M.Sathaye, adv. for the Respondent no.6.

CORAM: J.H.BHATIA,J.
DATE: 29th November,2007.

ORAL JUDGMENT:

1. **Rule.** Rule made returnable forthwith. With consent of the parties, the appeal is taken for final hearing immediately.

2. The appellant is the original plaintiff and the trust. The respondent nos.1 to 6 are the original defendants and the respondent nos.1 to 5 are the trustees of Heerabai Hansraj Surjee Trust. It is the contention of the plaintiff/appellant that on 3rd October, 1998, defendant/trust represented by the defendant nos.1 to 5 entered into an agreement for sale of suit property, which is a part of the Survey No.259/1/1 situated near Amrutdham Panchavati, Nashik, District and Taluka: Nashik. As per that agreement, the defendant trust sold the suit property to the plaintiff/trust for a consideration of Rs.71 lakhs. As per the agreement, an amount of Rs.25 lakhs was paid by the cheque and that cheque has been encashed and the

amount has been received by the defendants. According to the plaintiff, the balance amount of Rs.46 lakhs was to be paid on the execution of sale deed. As per the terms of the agreement for sale, plaintiff was put in possession of the suit property on the date of execution of the agreement for sale. Since then plaintiff is in possession of the same. The plaintiff has spent huge amount for making development and construction on the said suit property. It is contended that the defendant no.6 filed Regular Civil Suit No.143 of 2004 in the Court of Civil Judge Junior Division, Nashik for possession of the suit property against the defendant/trust. In the said suit, he sought declaration that the gift deed dated 15-3-1976 executed in favour of the defendant/trust was forged, invalid, illegal, void and ab-initio. The trustees of the defendant/trust filed consent pursis before the trial Court admitting the claim of the defendant no.6 and on the basis of their pursis, decree for possession was passed in favour of the defendant no.6. According to the plaintiff, it continues to be in possession and the decree obtained by the defendant no.6 in Regular Civil Suit No.143 of 2004 is collusive decree and not binding. In view of these circumstances, the plaintiff/trust filed suit and also an application at Exhibit 5 seeking temporary injunction restraining the defendants from disturbing the possession of the plaintiff, creating third party interest, changing the nature of the suit

property and carrying out any construction thereon.

3. The Application was filed was contested by the defendant nos.1 to 6 by separate written statements. However, it appears that by common stand of the defendant/trust as well as its trustees and the defendant no.6 is that suit property originally belonged to Gopaldas Khimji, who was adoptive father of the defendant no.6. Gopaldas Khimji had constituted one Ratansi Haridas Udeshi as his general power of attorney to carry on certain acts in respect of the suit property. However, under the said general power of attorney Ratansi Udeshi did not have any power to dispose off the property. In spite of this, the said Ratansi executed a gift deed dated 15th March, 1976 in favour of the defendant/trust, of which he himself was the managing trustee at the relevant time. That gift deed was not even registered and, therefore, that gift deed does not give any title to the defendant/trust over the suit property. Under the impression that the suit property was actually received in gift deed and the defendant/trust had become the owner of the property, the said property was also entered into Schedule I maintained by the Charity Commissioner in 1996. According to the defendant no.6 when he came to know that Ratansi had no right or power to execute a gift

deed and the said gift deed was wrongly executed, he filed Regular Civil Suit No.143 of 2004 claiming back the possession of the property. It is the common contention of the defendant nos.1 to 6 that after examination of record, trustees of the defendant/trust were satisfied that the trust had not become the owner of the suit property by virtue of the said gift deed and, therefore, the trustees filed pursis before the Civil Court on the basis of which the suit filed by the defendant no.6 came to be decreed. It is also their contention that after the suit was decreed, trustees of the defendant/trust moved an application before the Assistant Charity Commissioner for deletion of the said property from Schedule I and that prayer was accepted and the property was deleted from the Schedule I. Admittedly, the appeal has been filed by the plaintiff/trust against that order and that appeal is pending. It is contended by the defendant nos.1 to 6 that the said decree is not collusive but it is as per the real facts. It is further contended that such defendants/trustees did not get any title over the suit property and it is not in a position to pass the title over the suit property in favour of the plaintiff/trust. The defendant/trust has shown readiness to refund the amount of Rs.25 lakhs with interest, which has accrued, to the plaintiff.

4. Initially the trial Court had granted status-quo

on the application Exhibit 5 but after hearing the parties by the impugned order dated 5-9-2007, the learned Joint Civil Judge, Senior Division, Nashik rejected the application and status-quo order came to be vacated. Therefore, the plaintiff has preferred the present appeal.

5. Heard the learned counsel for the Parties and perused the relevant documents.

6. Mr.Shah the learned counsel for the appellant vehemently contended that there was collusion between the defendant nos.1 to 5 on one hand and the defendant no.6 on the other hand and the decree passed in favour of the defendant no.6 in the suit filed by him is a collusive decree. According to him, in view of the provisions of 50 of the the Bombay Public Trusts Act, 1950, the Charity Commissioner was necessary party in that suit but the Charity Commissioner was not made party and permission was not taken under Section 51 of the Bombay Public Trusts Act, 1950 from the Charity Commissioner before filing the suit and that itself shows that it was a collusive suit. He has pointed out the statement dated 24-12-2004 was made by the defendant/trust before the Urban Development Department, Government of Maharashtra in response to notice under Urban Land Ceiling Act wherein the defendant/trust has clearly stated that under the agreement for sale, the

defendant/trust has received an amount of Rs.25/- lakhs from the plaintiff/trust and had given possession of the suit property to the defendant/trust. In paragraph 8 of that statement, the defendant/trust had also made a statement that the plaintiff/trust had actually spent an amount of Rs.28,50,000/- on construction of wall compound and fencing, etc. He contended that in view of this, it is clear that as late as 24-12-2004, possession of the plaintiff over the suit property was admitted by the defendant/trust. According to him in view of this the defendant/trust was not in position to hand over the possession of the suit property to the defendant no.6. The Regular Civil Suit No.143 of 2004 filed by the defendant no.6 was decreed on 29-4-2006. According to him, physical possession of the property has not been taken from the plaintiff in execution of that decree. He contends that these documents show that the plaintiff in fact is in possession of the property. According to him, the suit for specific performance of the contract is pending wherein he has also sought declaration that the decree in Regular Civil Suit No.143 of 2004 is collusive and not binding . He contends that if the interim relief is not granted to him, the suit itself may become infructuous and, therefore, he vehemently prays for the interim relief as sought in Exhibit 5.

7. Mr.Sony the learned counsel for the defendant nos.1 to 5 simply supported the claim of the defendant

no.6 and submitted a bank statement indicating that the amount of Rs.25 lakhs received by the defendant/trust from the plaintiff has been kept in fixed deposit and substantial interest has been accrued on the same. According to him, the defendant/trust is not in a position to execute the decree in view of the plea taken by the defendants but it is willing to refund the amount of Rs.25 lakhs alongwith interest, which has accrued on the same.

8. Mr.Thorat the learned senior counsel for the the respondent/defendant no.6 vehemently contended that in view of the documents available on record, it is clear that the property belongs to Gopaldas Khimji and there is no valid document under which the title over the property has passed to the defendant/trust. He referred to the General Power of Attorney executed by Gopaldas Khimji in favour of Ratansi Udeshi on 26th October, 1958, which shows that Gopaldas Khimji had constituted Ratansi Udeshi as his General Power of Attorney for doing various acts including to accept or dispute the compensation and to file appeals before proper tribunal, to engage the solicitors, advocates for conducting or defending any appeal, action and proceedings, to declare and swear plaints, petitions, appeals, written statements, counterclaims, etc. to represent him in all the legal matters, to commence any action, suit or any other proceedings, to appear, act and represent before

any Civil, Criminal, Revenue or any Court or authority, etc., to demand and receive all monies recoverable by him, to execute all decrees and orders in his favour and generally to do, execute and perform all such acts, deeds and things as he shall deem fit, appropriate in relation to the property. Mr.Thorat vehemently pointed out that this General Power of Attorney does not give power to Ratansi Udeshi to transfer or to dispose of any property of Gopaldas Khimji. He also contended that the defendant/trust claims to have received suit property under the gift deed dated 15th March, 1976 executed by Ratansi Udeshi as General Power of Attorney of Gopaldas Khimji and incidentally at that time Ratansi himself was the Managing Trustee of the defendant/trust and thus, he himself made gift deed on behalf of Gopaldas Khimji and he himself also received that property as the managing trustee of the defendant/trust. The learned counsel pointed out that the said gift deed is not a registered document and the property involved in the said gift deed is Survey No.259/1/1 admeasuring 31993.53 sq.mtrs. situated at Amrutdham, Panchavati, Nashik. According to him, taking into consideration the size of the property, it must have been worth more than Rs.100/- and, therefore, under the provisions of Registration Act as well as Transfer of the Property Act, the gift deed was compulsorily required to be registered. Thus, according to him neither Ratansi Udeshi had a power to execute sale deed on the basis of gift deed nor that

unregistered gift deed could pass any title to the defendants. He vehemently contended that the defendant no.6 being adopted son of Gopaldas Khimji is entitled to that property and when in the year 2004, it came to his notice that the defendant/trust was wrongly claiming property, he filed the suit and the defendant no.5 being trustee of the defendant/trust after examination of record came to conclusion that the title of the suit property did not vest on the defendant/trust and rightly filed pursis before the trial Court. The learned counsel vehemently contended that in view of these circumstances and the documentary evidence, the defendant/trust is not in a position to pass valid title over the property to the plaintiff/trust and, therefore, in no circumstances, the plaintiff is likely to succeed in the suit for specific performance and if there are no chances of success in the suit, interim relief can not and should not be granted.

9. Admittedly, the defendant/trust accepted the gift of the suit property of Gopaldas Khimji through his General Power of Attorney Ratansi Udeshi in 1976 and in 1996 this property was entered in Schedule I maintained by the Charity Commissioner as property of the defendant/trust. That entry was taken after an enquiry was made by the Assistant Charity Commissioner. It is true that prima-facie Ratansi had executed gift-deed, which was not registered and that too without necessary

power under the general power of attorney executed by the Gopaldas Khimji and, therefore, the title over the property could not pass to the defendant/trust. However, the fact remains that from 1976 till 2004, when the defendant no.6 filed the suit for possession of the said property, this property was in possession of the defendant/trust and the defendant/trust treated it as its own property. Not only this, the defendant/trust entered into an agreement for sale of the suit property in favour of the plaintiff/trust in 1998 and received valuable consideration of Rs.25 lakhs as an advance. The defendant/trust admittedly put the plaintiff/trust in possession of the property under that agreement and this fact was admitted by the defendant/trust in its statement made as late as 24th December, 2004 before the Urban Development Department. It is true that some persons are common trustees in both trusts. However, that aspect can be looked into when the matter is taken up for final decision. In view of the statement made on 24-12-2004 also the plaintiff was in possession of the property on that day. The defendant/trust also admitted that the plaintiff had already spent about Rs.28.5 lakh on making certain constructions on that property. It is true that in Regular Civil Suit no.143 of 2004, decree was passed in favour of the defendant no.6 on 29-4-2006 for possession. However, there is nothing to show that decree was executed and the possession was actually taken away from the plaintiff/trust on the basis of that

decree. Merely because the decree was passed, in view of the consent pursis filed by the trustees of the defendant/trust, it can not be said, atleast prima-facie, that possession has been actually transferred from the plaintiff to defendant no.6. Several important questions are likely to arise in the suit filed by the plaintiff for specific performance of the contract including question of limitation because the defendant no.6 filed suit for possession 28 years after the gift deed was executed. Question may also arise whether the defendant/trust had become the owner of the property by adverse possession because it had claimed to be owner from 1976 till the suit was filed in the year 2004. This aspect is not considered by the trial Court. If in the suit for specific performance, the plaintiff succeeds in proving that the defendant/trust had become the owner of the suit property by adverse possession, even though the valid title was not passed by gift deed and that the suit filed by the defendant no.6 was barred by limitation, possibility of plaintiff succeeding in getting decree for special performance can not be ruled out.

10. It is well settled position of law that the property has to be protected and atleast status-quo has to be maintained pending the suit so that suit itself does not become infructuous. Of-course if the plaintiff is unable to make out any prima-facie case in his

favour, no relief can be granted. However, in the present case, as pointed out above, there are several important questions of law and facts, which need to be decided in the matter. Appeal filed by the plaintiff against the deletion of the suit property from Schedule I is also pending before the Charity Commissioner. In view of this fact and the admitted position that as late as December, 2004 plaintiff was in possession of the suit property, there is no reason to disbelieve the plaintiff that it continues to be in possession till today, atleast prima-facie. If at this stage no interim relief is granted to the plaintiff, there is every possibility that it may be ousted from the possession, the defendant no.6 may dispose off the property and when the suit for specific performance comes up for hearing, the plaintiff may not succeed. It is necessary to avoid such complications pending the suit. These aspects were not considered by the trial Court while rejecting the application.

11. For the aforesaid reasons, I am satisfied that the plaintiff/appellant has made out prima-facie case in his favour and if interim relief is not granted in his favour, he may suffer irreparable loss and its suit for specific performance may become infructuous. Therefore, in the interest of justice it is necessary to grant interim relief.

12. For the aforesaid reasons, appeal is allowed. Impugned order at Exhibit 5 is hereby set aside. Pending the suit the defendant no.1 to 6 are hereby restrained from causing any interference in the possession of the plaintiff over the suit property. The plaintiff is also restrained from creating third party interest over the suit property nor it shall make further development on the suit property. With these directions, appeal stands disposed off. The Charity Commissioner shall expedite the hearing of the appeal filed by the plaintiff and the trial Court may also expedite the hearing of the suit for specific performance.

13. At this stage, Mr.Thorat the learned Senior Counsel makes a request that this order may be stayed for a period of four weeks. In my opinion, the order passed by this Court fully protects the interest of both the parties, therefore, it will not be necessary pass any order on his request.

(J.H.BHATIA,J.)